



# **THE ATTORNEY GENERAL OF TEXAS**

**AUSTIN 11, TEXAS**

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May 26, 1961

Honorable Allen Melton  
Executive Secretary  
State Board of Morticians  
Rio Grande National Building  
Dallas, Texas

Opinion No. WW-1070

Re: Whether a member of the State Board of Morticians is eligible to be appointed to a second full term of six years, when such member has served under an appointment for six years, and for two additional years under an appointment to an unexpired term of another member of the Board.

Dear Mr. Melton:

We are in receipt of your letter in which you ask this office for an opinion concerning the following question:

"In the case of a member of the Board who has been regularly appointed by the Governor, confirmed by the Senate, and served a full six year term, and thereafter having been appointed to an unexpired term of another member of the Board and served two years in that appointment, may the Governor appoint that person to a second full term of six years?"

The State Board of Morticians is created under the provisions of Article 4582b of Vernon's Civil Statutes. Section 1 of said statute states, in part, as follows:

". . . The members of said Board shall be appointed by the Governor, by and with the consent of the Senate, for a period of six years, . . . Any vacancies existing on the Board at the time of the effective date of this Act shall be filled by the Governor, and the Governor shall, in appointing successive members to the Board, so designate their

terms so that two places on the Board shall become vacant each two years. Any vacancy in an unexpired term shall be filled by appointment of the Governor for the unexpired term. No member of the Board shall be appointed for more than two terms of service."

You attached to your request a brief in which you cited certain cases which involved the question of limitation of terms of office by constitutional provisions of other states. The cases which you cited are Ervin v. Collins, 85 So.2d 852, (Fla.Sup. 1956); Black v. Pate, 30 So. 434, (Ala.Sup. 1901); McGinnis v. Cossar, 18 S.W.2d 988, (Ky.Ct.App. 1929); Bozeman v. Laird, 45 So. 722 (Miss.Sup. 1908); Dodson v. Bowlby, 110 N.W. 698, (Neb.Sup. 1907); and Burgess of Coatsville, 6 Pa. Dist. 575.

Generally stated, the question involved in these cases concerns (1) elected public officials; (2) provisions in their respective state constitutions limiting terms of office, and (3) the general proposition that where the constitutional limitation is ambiguous, that doubt and ambiguity must be resolved in favor of eligibility to stand for re-election.

Your question presented to us for consideration, while similar in many respects to the question involved in the above mentioned cases, differs in this respect. Texas has no general constitutional prohibition limiting the terms of elected officials, and the fact situation involved in your question concerns not an elected official, but rather one that was created by the Legislature and appointed by the Governor to an administrative board. The only prohibition in the Texas Constitution in regard to appointments of members to administrative agencies is Paragraph 30a of Article XVI, which in effect states that terms of appointment shall be for six years and that the original appointments must be so staggered that one-third of the members' terms expire every two years.

The most recent case concerning limitations placed on terms of office is the case of Ervin v. Collins, *supra*, which reviews similar questions from other jurisdictions in the United States. The facts, briefly stated, were that LeRoy Collins was elected to the unexpired term of Governor after the death of Governor Dan McCarty. LeRoy Collins was so elected at a special election, pursuant to Section 19 of Article IV of the Constitution of Florida. The question presented to the Supreme Court of Florida was whether LeRoy Collins was eligible to run for a full term which would begin at the termination of the unexpired term

to which he was elected. Section 2 of Article IV of the Constitution of Florida provided that the Governor shall hold office for four years, but shall not be eligible for re-election to said office the next succeeding term.

Section 3 of Article IV of the Florida Constitution prescribed the qualifications for the office of Governor and Section 19 of that Constitution provided the procedure which was to be followed in the event of the impeachment of the Governor, his removal from office, death, resignation or inability to discharge his official duties. The Supreme Court of Florida held that Sections 2 and 19 are complementary in that Section 2 provides for a four year term limitation, and Section 19 provides for filling the office in the event of a vacancy by the occurrences of certain happenings. The Court was presented with authorities from other jurisdictions in the United States, the same being primarily those authorities mentioned in your brief. The court discussed, in this case, the case of Schardein v. Harrison, 18 S.W.2d 316 (Ky.Ct.App. 1929) which we shall discuss in more detail later in this opinion.

The Supreme Court of Florida, in applying the holdings in the various cases before mentioned, held that the vacancy which occurred after the death of Governor Dan McCarty was filled by three men during the four year term to which Governor McCarty was elected. They found that the Constitution of Florida was silent as to any inhibitions on those who completed the unexpired term and stated:

"It would be ridiculous to impose such inhibitions on them for the reasons they are said to have been imposed by Section 2, there being no provision in Section 19 authorizing it. \* \* \*

The Florida Supreme Court concluded its opinion, expressing the proposition that if there were doubts or ambiguities as to Governor Collins' eligibility they should be resolved "in favor of a free expression of the people in relation to the challenged provision of the Constitution."

In Schardein v. Harrison, supra, the sole question which was before the Kentucky Court was the proper construction of Section 160 of the Kentucky Constitution, which read that:

"The terms of office of mayors \* \* \* shall be four years, and until their successors shall be qualified. \* \* \*

"No mayor \* \* \* of any city of the first \* \* \* class, after the expiration of the term of office to which he has been elected under this constitution, shall be eligible for the succeeding term."

The court defined the meaning of the word "term" as used in their Constitutional provision and held:

"'Term' is thus identified and defined as a certain and fixed period of four years. It commences when the mayor is elected and inducted into office, and ends at the end of the four years for which he was elected. One or several persons may discharge the duties of the office during this period, but the term is not divided into smaller terms by the number of persons who may fill the office. It remains one and indivisible and term follows term in successive cycles of four years each. Nor does it die with the incumbent. On the contrary, if the incumbent or the one elected to the office should resign, refuse to qualify, or be impeached or removed from office, the term would remain unbroken until the recurring election for that office. . . ."

The Kentucky Court further interpreted the word "term" as used in this constitutional provision, as follows:

". . . This section demonstrates that the members of the convention constitutional had in mind a distinction between 'a term of office' and 'a part of a term' and understood how to use words to express this distinction. And the meticulous care they exercised in qualifying the word 'term' wherever used therein indicates that they understood the word 'term' to mean a full term of four years. . . ."

The Kentucky Court further discussed the case of Bosworth v. Ellison, 48 Ky. 708, 147 S.W. 400 (1912), where that court stated:

". . . A term of office when the period of the term is fixed \* \* \* means the period designated by the Constitution or Statute. \* \* \* When a person is appointed or elected to fill a vacancy in a term, he merely fills

out the term of his predecessor. He does not enter on a new term of office, as does a person who is elected or appointed and takes the office at the beginning of the term as fixed by law. . . ."

The court discussed the case of Pinkston v. Watkins, 186 Ky. 365, 216 S.W. 852 (1919), and held:

". . . 'The term of office of sheriff is four years, no more and no less. The present term throughout the state began with the first Monday in January, 1902. The term had but one beginning, and will have but one ending, though there may be a dozen incumbents during the one term.'"

Because Texas has no constitutional limitations on the terms of public offices we could find no Texas cases on the subject. The Legislature provided in Section 1 of Article 4582b of Vernon's Civil Statutes that the members of the Board would be appointed by the Governor "for a period of six years" and provided that any vacancy that might exist on the Board on the effective date of the Act shall be filled by the Governor, but in filling such vacancy shall designate their terms so that two places on the Board would become vacant every two years. The Legislature also provided for the appointment when vacancies occur and provided that "any vacancy in an unexpired term shall be filled by appointment of the Governor for the unexpired term." In the last sentence of Section 1, the Legislature provided that "no member of the Board shall be appointed for more than two terms of service." (Emphasis added)

In order to answer your question, we must determine what the Legislature intended by the phrase "two terms of service." In addition to the definition made by the Kentucky Court, as quoted above, we find that 41 Words and Phrases, 390, gives this definition of the words "term or terms of office":

"Ordinarily the word or words 'term' or 'term of office,' when used in reference to the term of office, means a fixed and definite period of time." (Citing cases)

In the case of Robinson v. U.S., 42 Court of Claims 52 (1907) the court used this definition:

"The word 'term,' when used with reference

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to the tenure of office, ordinarily refers to a fixed, definite time, and does not apply to appointive offices held at the pleasure of the appointing power. (In re Batey, 52 N.Y.S. 871-872; Somers v. State, 58 N.W.R. 804-806)."

43 Am. Jur. 17, Public Officers, Sec. 159, makes this statement:

" . . . where both the duration of the term of an office and the time of its commencement and termination are fixed by the Constitution or statutes, a person elected or appointed to fill a vacancy in such office holds for the unexpired portion of the term and until the qualification of a successor; . . . It seems the term of office of one elected or appointed to fill a vacancy in a board of several officers will be held to be for the unexpired term of his predecessor only, where the clear intent of the creating power is that the entire board should not go out of office at once but that different groups should retire at regularly recurring intervals." (Citing cases).

From the cases and authorities hereinabove cited, it is our opinion that the Legislature clearly provided that the members of the State Board of Morticians would be appointed for a term of six years. There can be no dispute in this regard. The Legislature, after setting out other provisions for various eventualities, provided that no member shall be appointed for more than "two terms of service."

It is our opinion that where the Legislature used the word "period" in one instance and the word "term" or "terms of service" on four other occasions within the same statute, the terminology was substantially the same.

50 Am. Jur. 228, Statutes, Sec. 238, states the following:

" . . . it is a general rule of statutory construction that words of a statute will be interpreted in their ordinary acceptation and significance and the meaning commonly attributed to them." Austin v. Strong, 117 Tex. 263, 1 S.W. (2d) 872 (1928); Bell v. Indian Live Stock Co., 11 S.W. 344 (Tex.Sup. 1889).

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And in Sec. 247 thereof at page 243, it states:

" . . . Thus, although words and sentences, or parts of sentences, have no very definite signification in their ordinary use, if a particular meaning and application appears from their use or connection in the statute, that meaning and application must be accepted as proper and controlling. . . ."

And in Sec. 271 thereof at page 259, it states:

" . . . It is accordingly held that other sections of the same act in which the same word or phrase is used may be resorted to as an aid in determining the meaning thereof. Under the rule, where the same word or phrase is used more than once in the same act in relation to the same subject matter and looking to the same general purpose, if in one connection its meaning is clear and in another it is doubtful or obscure, it is in the latter case given the same construction as in the former. . . ."

In Watterson v. Halliday, 77 Ohio 150, 82 N.E. 962 (1907), the Court declared that a word or phrase repeatedly used in the same statute indicates that special consideration was intended to be given to it.

In effect, the Legislature provided that the members appointed to the State Board of Morticians would be appointed for six year terms. However, because of Paragraph 30a of Article XVI of the Texas Constitution, certain members who would initially be appointed after the Act became effective, would receive only two year terms, others just four year terms and still others six year terms. The term of each, regardless of the period of time of their appointment, would have a definite beginning and a definite ending. These members are not appointed at will to serve for such periods within the discretion of the Governor. Initially, each was placed in a certain year group with a definite beginning and a definite ending. After that initial term was served, then upon reappointment or upon a new appointment, those so appointed received six year terms. By the terms of Section 1 of Article 4582b, the Legislature clearly provided that any vacancy in an unexpired term would be filled for the unexpired term, so that initial appointive terms would continue in sequence and a third of the membership would be subject to appointment every two years. The authorities

generally presented in this opinion seem to hold that an appointment to an unexpired term, or as in the case of Governor LeRoy Collins, where he was elected to an unexpired term, did not prohibit him from running for re-election immediately following the unexpired term.

It is our opinion that the Legislature of Texas provided that members appointed to the State Board of Morticians are appointed for six years. The Legislature further provided that they shall be limited to two terms. What the Legislature provided for in between these two propositions in the same statute, were for the purpose of directing and guiding the Governor if certain eventualities may occur, and to stay within the framework of the Texas Constitution.

It is our opinion that only those members who originally received two and four year terms and a subsequent six year term, would be prohibited for reappointment. The same, of course, holds true of those who originally received a six year term as they would have had two six year terms of service.

The facts as you presented, stated that one Board member originally received a six year term. Upon the expiration of that term, he was not reappointed for another six year term, but rather was appointed to fill the unexpired term of another member who left the board for some reason. Upon the expiration of this original term to which he was appointed, said member relinquished all power, authority and jurisdiction as a Board member. He stood in the position of any citizen save and except he having been previously appointed. When the Governor appointed him for the unexpired term, he could serve only such time that remained, which was less than six years. We conclude that the Legislature intended that members appointed to this Board serve six year terms. Having served one six year term, he was eligible to another six year term, if he were entitled to reappointment at all. The Governor is given broad and general discretion in appointments. However, he cannot circumvent the intention of the Legislature by appointing members to a shorter term, with the exception related above concerning the original appointments, and count these unexpired terms as full terms. Having served the unexpired term of a former member of the Board, such member is eligible, subject to the discretion of the Governor, for appointment to another six year term.



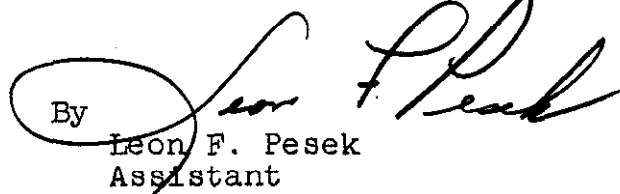
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S U M M A R Y

A member of the State Board of Morticians is eligible for appointment to a second six year term, having previously served a full six year term and the unexpired term of a former member on said Board.

Yours very truly,

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Attorney General of Texas

By   
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APPROVED:

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